Vermont Superior Court
Filed 05/03/22
Washington Unit

STATE OF VERMONT

| SUPERIOR COURT<br>Washington Unit | CIVIL DIVISION<br>No. 402-7-19 Wncv |
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| BENJIMAN NICHOLS,<br>Plaintiff,<br><br>v.<br><br>STATE OF VERMONT,<br>Defendant. | |
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CROSS-MOTIONS FOR SUMMARY JUDGMENT

Mr. Benjiman Nichols (formerly known as Timothy O'Keefe) claims that he is entitled to damages from the State under Vermont's Innocence Protection Act (VIPA), 13 V.S.A. §§ 5572–5578, following the reversal of his conviction for violating a foreign abuse prevention order by the Vermont Supreme Court.[1] See generally *State v. O'Keefe*, 209 Vt. 497 (2019). The State takes the position that it has immunity to Mr. Nichol's VIPA claim under 15 V.S.A. § 1108 and, otherwise, Mr. Nichols is not "actually innocent" within the contemplation of the VIPA. The parties have filed cross-motions for summary judgment addressing these issues.

The material facts are undisputed. A New Hampshire court issued the permanent abuse prevention order protecting the mother of Mr. Nichols' child (his ex-girlfriend) following a hearing that Mr. Nichols attended. The order was personally served on Mr. Nichols' lawyer, and Mr. Nichols had actual notice of it. At some point thereafter, Mr. Nichols filed a motion, triggering a hearing, in his and the mother's Vermont family case (in Windham) raising a child support issue. When the mother arrived at the courthouse parking lot for the hearing, Mr. Nichols approached her, told her that he did not care about the money, had only filed the motion because he wanted to talk to her about other issues (custody, etc.), and they began to speak while the disconcerted mother remained in her truck. A court officer approached, Mr. Nichols left the scene and went into the courthouse, the mother gave the officer a copy of the New Hampshire protection order, Mr. Nichols admitted to the officer that he was aware of the order, and the officer then arrested him for violating it. There is no dispute that the officer had probable cause to arrest Mr. Nichols. Nor is there any dispute that, but for the New Hampshire order, Mr. Nichols' conduct in speaking with the mother was noncriminal.

Mr. Nichols was charged with two counts of violating the foreign order in the Windham criminal court, convicted, and he appealed. An issue had arisen in the criminal proceeding as to whether the order was required by New Hampshire law to have been sent by the court to Mr. Nichols' last known address. The trial court determined that, in the

[1] This is the sole remaining claim in this case.

circumstances, there had been no violation of New Hampshire law. On this point, the Vermont Supreme Court disagreed. It reversed the conviction because the State had failed to prove that the permanent protection order had been mailed to Mr. Nichols' last known address by the New Hampshire court in compliance with New Hampshire law.[2]

*The issues*

To Mr. Nichols, this is a straightforward case. The relevant VIPA provisions are as follows:

> (a) A claimant shall be entitled to judgment in an action under this subchapter if the claimant establishes each of the following by clear and convincing evidence:
> (1) The complainant was convicted of a felony crime, was sentenced to a term of imprisonment, and served at least six months of the sentence in a correctional facility.
> (2)(A) the complainant's conviction was reversed or vacated, the complainant's information or indictment was dismissed, or the complainant was acquitted after a second or subsequent trial; or
> (B) the complainant was pardoned for the crime for which he or she was sentenced.
> (3) The complainant is actually innocent of the felony or felonies that are the basis for the claim. As used in this chapter, a person is "actually innocent" of a felony or felonies if he or she did not engage in any illegal conduct alleged in the charging documents for which he or she was charged, convicted, and imprisoned.
> (4) The complainant did not fabricate evidence or commit or suborn perjury during any proceedings related to the crime with which he or she was charged.

13 V.S.A. § 5574(a). There is no dispute about subsections (a)(1), (a)(2), and (a)(4). The only dispute is whether, in the circumstances of this case, Mr. Nichols is "actually innocent" for purposes of subsection (a)(3). As the statute says, "a person is 'actually innocent' . . . if he or she did not engage in any illegal conduct alleged in the charging documents for which he or she was charged, convicted, or imprisoned." According to Mr. Nichols, since the protection order was not sent to his last known address, see n.2 below, it was not enforceable against him. Therefore, he did nothing illegal, and the State should be liable for his incarceration under the VIPA. Otherwise, all he did, he urges, was to speak innocuously with his ex-girlfriend in a parking lot.

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[2] To be clear, neither the Supreme Court's decision nor anything else in the record of this case establishes that the New Hampshire court *actually* failed to so mail the order, only that, from an appellate perspective, as described in the Vermont Supreme Court decision, the Vermont prosecutor had failed to affirmatively prove that the mailing had occurred. Mr. Nichols effectively treats the Supreme Court's ruling as proving that the mailing did not happen. It does not. In the criminal proceeding, the State had the burden of proof, and it failed to prove that the mailing had occurred. Failing to prove that something occurred does not mean that it in fact did not occur. Here, Mr. Nichols has the burden of proof, and it is incumbent upon him to affirmatively prove that the mailing did not occur. Thus far, he has not attempted to prove that essential fact, which the court considers to be disputed.

According to the State, it has statutory immunity to this suit under 15 V.S.A. § 1108. In the alternative, it argues that "actual" (compensable) innocence under VIPA must be distinguished from "legal" or "technical" (not compensable) innocence. Here, the State argues, Mr. Nichols may have been legally, or technically, innocent in the sense that the State failed to prove that a specific mailing from the New Hampshire court had occurred, rendering his conviction defective, but he was not actually innocent insofar as he was aware of the New Hampshire order and its terms and he violated it as charged.[3]

*Immunity under 15 V.S.A. § 1108(b)*

Section 1108 is the "enforcement" section of Vermont's abuse prevention statutes. As relevant, it provides, "A foreign abuse prevention order shall be accorded full faith and credit throughout this State and shall be enforced as if it were an order of this State." 15 V.S.A. § 1108(a). "A law enforcement officer may rely upon a copy of . . . any foreign abuse prevention order that has been provided to the law enforcement officer by any source." *Id.* § 1108(b). "An officer's reasonable reliance as provided in this subsection shall be a complete defense in any civil action arising in connection with a court's finding under subsection (c) of this section that the order was not enforceable." *Id.* § 1108(b). Subsection (c) then provides:

> (c) A foreign abuse prevention order shall be enforceable in the courts in this State if all the following are satisfied:
> (1) The defendant has received notice of the order in compliance with the requirements of the issuing state.
> (2) The order is in effect in the issuing state.
> (3) The court in the issuing state had jurisdiction over the parties and the subject matter under the law of the issuing state.
> (4) In the issuing state, the law gives reasonable notice and opportunity to be heard to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within a reasonable time after the order is issued, sufficient to protect the defendant's due process rights. Failure to provide reasonable notice and opportunity to be heard shall be an affirmative defense to any charge or process filed seeking enforcement of the foreign protection order.

The § 1108(b) immunity provision extends to "any civil action arising in connection with a court's finding under subsection (c) of this section that the order was not enforceable." The State argues that this is "any civil action" and it arose "in connection with" a determination that Mr. Nichols had not "received notice of the order in compliance with the requirements of the issuing state." Therefore, according to the State, it is entitled to immunity in this case.

Section 1108 immunity does not properly apply to bar VIPA liability, as applied to the circumstances of this case, for several reasons. First, while the overarching purpose of the statute is to ensure that foreign abuse prevention orders are given full faith and credit

[3] Mr. Nichols has claimed that he thought the order did not apply in Vermont, but by its terms it clearly did. Thus, he either knew or should have known that it applied in Vermont.

in Vermont, its focus is on the frontline law enforcement officers who must enforce those orders in the first instance. The conduct of the officer who arrested Mr. Nichols has nothing to do with this case. This case arose out of the subsequent conduct of the prosecutor and rulings of the trial court. Section 1108 does not appear to be intended to apply in these circumstances.

Beyond that, insofar as the language of § 1108 is broad ("any" "in connection with"), it is vague. In contrast, the disputed liability in this case arises specifically under 13 V.S.A. § 5574(a). In other words, § 5574(a) specifically addresses the issue in this case. Insofar as § 1108 establishes a broader principle of immunity, the more specific statutory provision, VIPA, governs. See *Town of Brattleboro v. Garfield*, 2006 VT 56, ¶ 10, 180 Vt. 90.

This should be especially so here, where the VIPA plainly is remedial legislation. See *State v. Therrien*, 161 Vt. 26, 31 (1993) ("We must apply remedial legislation liberally to accomplish its purposes."). While § 1108 may be considered remedial as well, its evident purpose, ensuring that Vermont law enforcement officers are not dissuaded from enforcing unfamiliar foreign abuse prevention orders, does not conflict with VIPA's purpose to compensate those who were actually innocent yet served substantial time in prison regardless, and there is no actual conflict in this case insofar as Mr. Nichols seeks to establish liability against the State only.

Finally, the operative provisions of § 1108 date to 1996. See 1995, Adj. Sess., No. 170, § 28. The operative provisions of the VIPA were more recently adopted in 2014. See 2013, Adj. Sess., No. 126. Thus, while the drafters of the § 1108 immunity provision could not have foreseen the provisions of VIPA at issue in this case, the drafters of those VIPA provisions presumably were well aware of § 1108 and clearly did nothing to "clarify" that § 1108 should be construed to trump the VIPA. See *Shires Hous., Inc. v. Brown*, 2017 VT 60, ¶ 18, 205 Vt. 186 ("we presume that the Legislature is aware of the backdrop against which it is legislating").

For all these reasons, the court concludes that § 1108 does not apply in this case.

*Liability under 13 V.S.A. § 5574*

Mr. Nichols is not "actually innocent" for purposes of VIPA liability, however. As applied to this case, VIPA liability attaches if a person is "actually innocent" and "a person is 'actually innocent' of a felony or felonies if he or she did not engage in any illegal conduct alleged in the charging documents for which he or she was charged, convicted, and imprisoned." This definition of actual innocence is patently ambiguous.

In the law generally, innocence has two well-established meanings. "Actual innocence" means "[t]he absence of facts that are prerequisites for the sentence given to a defendant." Black's Law Dictionary (7th ed. 1999) at 792. "Legal innocence" means "[t]he absence of one or more procedural or legal bases to support the sentence given to a defendant." *Id.*

By using the term "actual innocence" in § 5574, the legislature obviously was drawing a distinction between actual innocence and legal innocence. Indeed, Mr. Nichols readily conceded as much at oral argument. However, by referring to "illegal" conduct in

the definition of actual innocence, the legislature appears to have incorporated the meaning of legal innocence into the definition of actual innocence, producing a circularity in which any kind of innocence presumably might satisfy the actual innocence standard of § 5574. See Black's Law Dictionary (7th ed. 1999) at 750 (defining "illegal" simply to mean "unlawful"). This plainly is not what the legislature was attempting to achieve with this provision.

In this case, Mr. Nichols leans heavily on whether his conduct was "illegal." There is no dispute that his actual conduct was precisely as charged. He simply argues that, supposing he was not in fact sent the notice from the New Hampshire court, that conduct turns out not to have been illegal insofar as the abuse prevention order was unenforceable.

The appropriate emphasis in the statutory definition of actual innocence, however, should be placed on the "conduct alleged in the charging documents," that is, whether the person engaged in the charged conduct regardless whether the person ultimately ended up with criminal liability. In this case, Mr. Nichols knew he had a New Hampshire abuse prevention order in place, he knew or should have known that it applied in Vermont, and he nevertheless intentionally created a situation in which the subject of the order would predictably arrive at a certain location at which time he approached her in violation of the order. With these as the undisputed facts of the case, the court fails to see how Mr. Nichols could possibly prove that he did not engage in the conduct for which he was charged, regardless that the order ultimately was determined to be unenforceable for other reasons.

*Enforceability of order in the court parking lot*

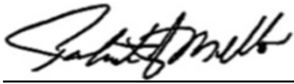
Finally, on a different tack, Mr. Nichols argues that, under a New Hampshire statute, the order was not applicable in the courthouse parking lot where the interaction took place just prior to a scheduled child support hearing. If this were so, it nevertheless is not clear that it would save Mr. Nichols' VIPA claim. However, it is not so. The statute provides as follows, "A no-contact provision in a protective order . . . shall not be construed to: . . . (b) [p]revent a party from appearing at a scheduled court or administrative hearing." N.H. Rev. Stat. Ann. § 173-B:5-a(II)(b). Mr. Nichols' argument that somehow this provision made the order entirely inapplicable all around the "curtilage" of the courthouse, as he puts it, and permitted him to otherwise completely unnecessarily approach his ex-girlfriend in an uncontrolled outdoor environment seriously outruns the reach of the statute. The order was not enforced to prevent Mr. Nichols from attending a hearing, and he was not arrested for having done so. This argument has no basis in the statute. Reasonably unavoidable contact necessary to attending the hearing is not what happened.

It is unnecessary to address any other issues raised by the parties.

Order

For the foregoing reasons, the State's motion for summary judgment is granted, and Mr. Nichols' is denied. The State shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 28th day of April, 2022.



Robert A. Mello
Superior Judge